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No. 84-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
CITY OF WINFIELD, KANSAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE CITY OF WINFIELD, KANSAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review an unreported memorandum decision of the United States Court of Appeals for the District of Columbia Circuit with no precedential effect in which the Court of Appeals affirmed the unanimous rulings of the Federal Energy Regulatory Commission and two of its Administrative Law Judges, when the Court of Appeals' decision is amply supported by the applicable law and is consistent with the decisions of other federal courts of appeals on the same subject.

2. Whether the Federal Energy Regulatory Commission acted in contravention of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and this Court's decision in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), when it reduced Arkansas Louisiana Gas Company's ("Arkla") rates in a 36 month review proceeding conducted pursuant to Section 154.38(d)(4)(vi)(*a*) of its regulations, 18 C.F.R. § 154.38(d)(4)(vi)(*a*), to a level above that of Arkla's "last firm rate," *i.e.*, its old Base Tariff Rate, as of the effective date of Arkla's 36 month filing.

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BRIEF IN OPPOSITION OF THE CITY OF WINFIELD, KANSAS

Respondent City of Winfield, Kansas ("Winfield"),[1] in accordance with Sup.Ct.R. 22, hereby opposes the "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" (Petition") filed in the above-captioned docket by Arkansas

[1] Winfield was an intervenor in the court of appeals proceeding below and accordingly is considered a respondent in this Court by virtue of Sup.Ct.R. 19.6.

Louisiana Gas Company, a Division of Arkla, Inc. ("Arkla"), on November 5, 1984.

OPINIONS BELOW

The description of the opinions below contained in Arkla's Petition at 1-2 is acceptable to Winfield.[2]

JURISDICTION

Winfield concurs in Arkla's representations (Arkla Petition at 2-3) that (i) the Commission had jurisdiction to review Arkla's rates pursuant to Section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c; (ii) Arkla sought review in the Court of Appeals of the Commission's determinations pursuant to Section 19(b) of the NGA, 15 U.S.C. § 717r(b); (iii) the Court of Appeals entered its judgment on June 14, 1984, and denied rehearing on August 8, 1984; and (iv) assuming *arguendo* that this Court determines that this case is worthy of its review, it has jurisdiction to hear it under 28 U.S.C. § 1254(1) and Section 19(b) of the NGA.

STATUTES AND REGULATIONS INVOLVED

The memorandum opinion of the Court of Appeals and the opinions of the Comn ission below fully complied with the dictates of Section 4 of the NGA, 15 U.S.C. § 717c, including the portion of Section 4(e), 15 U.S.C. § 717c(e), which Arkla quoted in its Petition at 3. Winfield disputes that Section 5(a) of the NGA, 15 U.S.C. § 717d(a), has any special relevance to the issues presented here.

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[2] In discussing the opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission"), Winfield will cite to both the Federal Energy Regulatory Commission Reporter, published by Commerce Clearing House, Inc. ("FERC CCH"), the official reporter of the Commission, and to the Appendix prepared by Arkla to accompany its Petition. As Arkla noted, the Court of Appeals' *per curiam* memorandum opinion was unreported pursuant to D.C. Cir. Rule 13(c), and its order denying rehearing was also unreported; accordingly, in referring to these documents, Winfield will cite only to Arkla's Appendix.

While Arkla fails to mention it, the Commission's regulation governing purchased gas adjustment ("PGA") filings of interstate natural gas pipelines, 18 C.F.R. § 154.38(d)(4), is at the heart of this case. 18 C.F.R. § 154.38(d)(4)(vi) (*a*)-(*c*) are of particular importance:

> (iv)(*a*) Upon the expiration of 36 months after the effective date of the PGA clause, the company shall file a tariff sheet(s) restating its rates to establish a new Base Tariff Rate. The Company shall state its agreement that this filing will automatically be subject to refund concurrently with the filing at the end of 36 months of the tariff sheets establishing a new Base Tariff Rate until an agreement is reached or a Commission determination is made. With this tariff sheet(s) the company shall file a study in the form and with the content prescribed by § 154.38 of the Regulations, except Statements O and P, to support the new Base Tariff Rate. (If the Company has a section 5(a) case pending a final order or has a section 4(e) filing for which the proposed rates would not become effective before termination of the 36-month period, a study from that proceeding may be utilized.) This study shall be based upon actual costs for the twelve months of most recently available experience, provided that the 12-month period used ends not more than 4 months prior to the expiration of the 36-month period. Annualization for changes which actually occurred in the 12 months will be permitted. This study shall be served on the company's jurisdictional customers and interested State commissions concurrently with the Company's filing with the Commission.
>
> (*b*) If a section 4(e) case is filed before the expiration of the 36-month period, a new 36-month period will start running when the proposed rates go into effect. Rates determined by the Commission in a section 4(e) or a 5(a) proceeding or rates in a settlement agreement approved by the Commission shall establish the new Base Tariff Rate when they

become effective pursuant to a final order, and a new 36-month period will start running.

(*c*) If either as a result of conferences among the company, its jurisdictional customers, interested State commissions, and the Commission staff, or as a result of Commission determination after hearing, it is found, based on the aforementioned study, that the jurisdictional cost of service is less than the jurisdictional revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or determined, and shall refund to its jurisdictional customers any excess amounts collected subject to refund to the date of billing under the revised tariff sheets, with interest to that date. This refund obligation shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate.

Boiled down to its essentials, Arkla claims that the Commission and the Court of Appeals applied 18 C.F.R. § 154.38d(4)(vi)(*c*) in contravention of Section 4(e) of the NGA and of this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

STATEMENT OF THE CASE

As Arkla notes in its Petition at 4, Arkla makes jurisdictional sales for resale to Northwest Central Pipeline Corporation under its Rate Schedule X-26 and to four distribution customers in Oklahoma and Kansas under its Rate Schedule G-2. Winfield is the largest of Arkla's four G-2 purchasers. Winfield is a city organized under the laws of the State of Kansas and is a "municipality" as that term is defined in Section 2(3) of the NGA, 15

U.S.C. § 717a(3). It owns and operates the gas distribution system serving its community for the benefit of its citizens and purchases all of its gas supplies for resale therein from Arkla. Winfield accordingly participates in Arkla's rate proceedings before the Commission to ensure that the rate Winfield pays Arkla is the "lowest reasonable rate consistent with the maintenance of adequate service in the public interest." [3]

Arkla correctly describes (Petition at 4) the facts surrounding the filing of its rate case at issue here. It also correctly describes the mechanism set out in 18 C.F.R. § 154.38(d)(4) which permits interstate pipelines to make twice-yearly PGA filings to pass through to their customers on a current basis their cost of purchased gas. Arkla, however, omits certain vital facts.

First, the PGA filing device is an administratively-created exception to the statutory requirement that interstate pipelines increase their rates only by a full-blown rate increase filing made pursuant to NGA Sections 4(d), 15 U.S.C. § 717c(d), and 4(e). In the proceeding concerning such filing, the Commission scrutinizes *all* of a pipeline's costs and revenues to determine the just and reasonable unit rates. The Commission's predecessor, the Federal Power Commission,[4] in response to a growing backlog of Section 4 rate filings seeking recovery of increased purchased gas costs, created a streamlined filing procedure in 1972 that permitted pipelines that elected to utilize it to recover their purchased gas costs through twice-yearly filings reflecting increases or decreases in these costs alone.[5]

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[3] FPC v. Hope Natural Gas Co., 320 U.S. 591, 611 (1944).

[4] In 1977 the Federal Power Commission was abolished and its functions transferred to the newly-formed Federal Energy Regulation Commission. Winfield will refer to both entities as the "Commission".

[5] In effect, the Commission decided to permit interstate pipelines to "track" increases (and decreases) in their purchased gas

This new privilege, however, did not come without a price. To ensure that pipelines did not use PGA filings as a tool to avoid scrutiny of their rates while automatically collecting increases in purchased gas costs, the Commission required all pipelines that elected to use the PGA filing device to file a complete cost and revenue study at least once every 36 months and to agree in advance that its rates would be subject to refund concurrently with the effective date of the 36 month filing. 18 C.F.R. § 154.38(d)(4)(vi)(*a*). If the Commission found that the pipeline's rates were indeed excessive, it would reduce the rates to a just and reasonable level as of the date of the 36 month filing, subject only to the requirement that the new rate it established, *i.e.*, the new Base Tariff Rate, would not be lower than the rate established in the pipeline's last rate case effective 36 months earlier (the old Base Tariff Rate). *See* 18 C.F.R. § 154.38(d)(4)(vi)(*c*). If the new Base Tariff Rate was found to be lower than the old Base Tariff Rate, then any rate reduction below the old Base Tariff Rate would be prospective from the date of the final Commission order establishing the new Base Tariff Rate. *Id.*

Arkla admits, as it must, that the Section 4 rate increase involved here, which became effective on November 1, 1980, was filed to satisfy the 36 month filing requirement, which practice is permissible under 18 C.F.R. § 154.38(d)(4)(vi)(*a*). Arkla Petition at 5. It fails to note, though, that by making this filing, it opened all of its costs and revenues to Commission scrutiny and took the risk that the Commission would (i) find the new Base Tariff Rate proposed by Arkla to be unreasonably high, (ii) determine the just and reasonable new Base Tariff

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costs in their rates on a current basis. The Commission's general policy has been and continues to be to discourage any "trackers" in pipeline rates that would reflect increases in costs automatically. *See, e.g.*, El Paso Natural Gas Co., 28 FERC (CCH) ¶ 61,185 (1984) (Commission denied pipeline request for tracker reflecting certain accrued gas purchase prepayments). The PGA is by far the most notable exception to this policy.

Rate, and (iii) order Arkla to refund the difference between the new Base Tariff Rate that Arkla put into effect and the Commission's just and reasonable new Base Tariff Rate. This is in fact exactly what happened.

Applying these principles to the chart at the top of page 6 of Arkla's Petition reveals the following situation. Arkla filed for a rate of 178.25¢ per Mcf (Arkla's suggested new Base Tariff Rate), which rate became effective subject to refund by Arkla's prior agreement on November 1, 1980. After examination of Arkla's costs and revenues, the Presiding Administrative Law Judge found and the Commission agreed that the just and reasonable new Base Tariff Rate was 156.09¢ per Mcf. Because the new Base Tariff Rate of 156.09¢ was not less than the old Base Tariff Rate of 78.11¢, *i.e.*, the rate set in Arkla's last full Section 4 rate proceeding (which Arkla refers to as the Pre-existing Base Rate), the Commission ordered refunds of the full difference as of the November 1, 1980 effective date of Arkla's 36 month filing.

Arkla's implication in its Statement of Facts (Petition at 6-7) that the Commission had to accept as a given Arkla's PGA adjustments of 90.62¢ which had accumulated since the effective date of Arkla's old Base Tariff Rate, and that any reduction of more than 9.52¢ (the difference between the new Base Tariff Rate proposed by Arkla and the old Base Tariff Rate plus the cumulative PGA adjustments) back to the November 1, 1980 effective date of Arkla's new rate filing was therefore a "retroactive" refund, is erroneous. To the contrary, Arkla effected the intervening PGA increases by streamlined PGA filings which the Commission did not scrutinize but which it merely accepted for filing and permitted to go into effect.[6] Moreover, the *quid pro quo* that Arkla agreed to

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[6] Section 154.23 of the Commission's regulations provides that "[t]he acceptance for filing of any tariff, contract, or part thereof is not to be considered as approval by the Commission." 18 C.F.R. § 154.23.

when it decided to recover its purchased gas costs through PGA filings rather than Section 4 rate increase filings was that it would subject *all* of its costs and revenues to Commission review every 36 months and that the Commission in that review proceeding could net all costs and revenues (including purchased gas costs) against each other in determining the new Base Tariff Rate. So long as the old Base Tariff Rate (here 78.11¢ per Mcf) did not exceed the new Base Tariff Rate (here 156.09¢ per Mcf), the Commission was free to reduce Arkla's rates as of November 1, 1980, as it did indeed do. Hence, there was no illegal "retroactive" 12.64¢ per Mcf refund, as Arkla implies. Arkla Petition at 7.

SUMMARY OF REASONS FOR DENYING THE WRIT

The issue that Arkla would have this Court review is not complicated, nor did it cause any difficulties for the various tribunals below. The Commission and two different Presiding Administrative Law Judges fully considered Arkla's claims and rejected them. The Commission did not even consider the issue worthy of extended discussion; rather, it simply affirmed the Presiding Administrative Law Judge's Initial Decision on the issue. Likewise, the Court of Appeals affirmed the Commission in a *per curiam* memorandum opinion that it did not even designate for publication, thus rendering it of no precedential effect. Subsequently, the Court denied Arkla rehearing as well. Arkla's claims have received full consideration by four different decision-makers and have been unanimously rejected. No grounds have been presented by Arkla meriting yet additional review by this Court.

Nor is there any conflict in the decisions of the various federal courts of appeals on this issue. While Arkla attempts to construct a conflict, the primary case it relies upon, *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), did not reach the particular issue considered here. In fact, the Commission opinion that was affirmed in that case made the same distinction

that the Commission made below in this case between the use of full Section 4 rate proceedings under the NGA and "tracking" rate increases in calculating the "last firm rate."

Moreover, while Arkla attempts to dismiss it in a footnote, the decision of the United States Court of Appeals for the Eleventh Circuit in *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984), did reach the exact issue that the Court of Appeals decided below, and the Eleventh Circuit there reached the same result as the Court of Appeals did here. Thus, there is no conflict of authority that would merit this Court's attention.

Turning to the merits of Arkla's claims, the Commission's actions below did not violate Section 4 of the NGA or this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). The Commission made it clear at the time that it finally promulgated 18 C.F.R. § 154.38(d)(4)(vi)(*c*) in 1972 that the refund floor below which refunds could not be made in a 36 month review proceeding was the old Base Tariff Rate *without any interim tracking-type rate increases*. Thus, the applicable "last firm rate" is Arkla's old Base Tariff Rate of 78.11¢ per Mcf, below which rate the Commission did not require Arkla to make refunds. The Court of Appeals below accordingly found that the Commission's refund order was in compliance with the dictates of Section 4 of the NGA and this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). There is no reason for this Court to review or disturb its holding.

REASONS FOR DENYING THE WRIT

1. The Course Of The Proceedings Below Amply Demonstrates The Lack Of Merit In Arkla's Claims.

Arkla's claim that any refund the Commission might order below the old Base Tariff Rate plus cumulative PGA adjustments would constitute a "retroactive" refund was one of the primary issues litigated in the proceedings

below. Arkla first raised the claim to Presiding Administrative Law Judge Stephen M. Charno in connection with his consideration of a proposed settlement of Arkla's rate increase. After hearing extensive argument (R. 14-50), Presiding Judge Charno ruled from the bench (R. 104-05) that the proper refund "floor" in this case was the old Base Tariff Rate without any subsequent PGA adjustments.

Presiding Judge Charno was later replaced by Presiding Administrative Law Judge George P. Lewnes, who actually heard the case on the merits and issued the Initial Decision. After permitting Arkla to reargue the issue *de novo* on brief and reviewing the legal arguments of all parties, he too found that the refund floor below which Arkla's rates could not be reduced effective November 1, 1980, was the old Base Tariff Rate without subsequent PGA increases. *Arkansas Louisiana Gas Co.*, 19 FERC (CCH) ¶ 63,008 at pp. 65,064-66 (1982), App. 20a-25a.

Arkla appealed this aspect of the Presiding Judge's Initial Decision to the full Commission along with several other issues. On review of the Presiding Judge's Initial Decision, the Commission in its Opinion No. 160 affirmed the Presiding Judge on this issue without comment. *Arkansas Louisiana Gas Co.*, 22 FERC (CCH) ¶ 61,125 (1983), App. 10a-17a. Arkla again raised the issue on rehearing. In Opinion No. 160-A, 23 FERC ¶ 61,030 (1983), App. 18a-19a, the Commission denied rehearing of this issue, specifically confirming Presiding Judge Lewnes' ruling.

Arkla then sought judicial review of the Commission's opinions in the Court of Appeals. After reviewing the briefs of the parties and hearing oral argument on the issue, the panel (comprised of Circuit Judges Mikva and Bork and Senior Circuit Judge Bazelon) in an unreported *per curiam* memorandum opinion issued pursuant

to D.C. Cir. Rule 13(c) affirmed the Commission's opinions in their entirety. App. 1a-6a. Arkla sought rehearing of the Court of Appeals' memorandum opinion, which the panel denied by a one sentence unreported order. App. 7a. Arkla's Petition to this Court followed.

As the above chronology makes abundantly clear, Arkla's argument has already been presented to four decisionmakers (Presiding Judge Charno, Presiding Judge Lewnes, the Commission itself, and the Court of Appeals) no less than six times. All resolved the issue against Arkla. None of them perceived the violation of the NGA that Arkla here asserts. The Commission and the Court did not even regard the question as a close one, as evidenced by the Commission's simple affirmance of Presiding Judge Lewnes' holding and the Court's determination to decide the issue in an unreported *per curiam* memorandum opinion. This unanimity of opinion belies Arkla's claims that its arguments merit this Court's attention.

2. There Is No Conflict Between The Federal Courts Of Appeals' Decisions On This Issue.

Arkla claims in its Petition (at 9, 11-12) that the Court of Appeals' decision below conflicts with the opinion of the United States Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1984) (*"Distrigas"*). This is not the case. If anything, *Distrigas* supports the decision of the Court of Appeals below.

In *Distrigas*, the First Circuit reviewed the Commission's opinions in *Distrigas of Massachusetts Corp.*, Opinion No. 178, 23 FERC (CCH) ¶ 61,416 (1983) and Opinion No. 178-A, 24 FERC (CCH) ¶ 61,250 (1983). In Opinion No. 178, the Commission itself held that it had no statutory power to reduce Distrigas' rates other than prospectively below the Company's last Commission-approved rate (in that instance, the initial rates

approved by the Commission in the course of issuing Distrigas its original certificate of public convenience and necessity, which rates were reached in a settlement agreement), citing *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). *See* Opinion No. 178, 23 FERC (CCH) ¶ 61,416 at p. 61,921. The First Circuit in *Distrigas* affirmed this Commission holding.

Opinion No. 178, however, made clear that the refund floor below which Distrigas could not be made to reduce its rates other than prospectively was its last *Commission-approved* rate, not whatever rate Distrigas happened to be charging immediately prior to the time that its new rate increase became effective. The Commission specifically stated that "refunds must be limited to the level of the initial rate, *not increased by any tracking provisions*, found in DOMAC's certificate." *Id.* (emphasis supplied) (footnotes omitted). This particular aspect of the Commission's opinion was not challenged on appeal and the First Circuit did not disturb it.

Arkla's position here is not that the Commission unlawfully reduced its rates effective November 1, 1980, below the last Commission-approved rate, *i.e.*, the old Base Tariff Rate of 78.11¢ per Mcf. Rather, Arkla claims that the Commission erroneously reduced its rates as of that date below 168.73¢ per Mcf, *i.e.*, the old Base Tariff Rate *plus Arkla's cumulative PGA tracking adjustments*, which rate it was charging immediately prior to November 1, 1980. Thus, even under the Commission's holding in Opinion No. 178, which holding the First Circuit left undisturbed, Arkla's claim would be denied.

It is therefore simply not true that "in contrast to Arkla, the Commission and the court held [in *Distrigas*] that the refund power is limited to the proposed increase." Arkla Petition at 11-12. The Court of Appeals' memorandum opinion here and the First Circuit's *Distrigas* opinion do not conflict.

Also, Arkla attempts to dismiss in a footnote a recent opinion of the United States Court of Appeals for the Eleventh Circuit, *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (1984) (*"Florida Gas"*), claiming that the court there "did not reach the precise issue involved here." Arkla Petition at 12 n. 17. To the contrary, that case does address the issue Arkla raises here. The Eleventh Circuit there approved the Commission's decision in *Florida Gas Transmission Co.*, 19 FERC (CCH) ¶ 61,293, *reh'g denied*, 20 FERC ¶ 61,195 (1982), in which the Commission held that a pipeline's transportation rates as well as its sales rates are subject to restatement and refund in a 36 month review proceeding conducted pursuant to 18 C.F.R. § 154.38(d)(4)(vi)(*a*).[7]

The pipeline involved in *Florida Gas* appealed the Commission's decision, claiming that since it had increased only its sales rates by virtue of its PGA filings, it should not be required to restate both its sales and transportation rates in its 36 month filing and that its transportation rates should not be made subject to refund as of the effective date of its 36 month filing. The Eleventh Circuit affirmed the Commission's decision, stating:

> Florida Gas' argument that its transportation costs are being lowered below "the last clean rate" fails to recognize that the Base Tariff Rate is a composite rate. Refund liability is determined by comparing the restated Base Tariff Rate with the Base Tariff Rate as finally approved by the Commission. 18 C.F.R. § 154.38(d)(4)(vi)(*C*). *The refund liability is measured by the previously approved Base Tariff Rate. Florida Gas' previous Base Tariff Rate*

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[7] The Commission in denying Arkla's application for rehearing on the point Arkla raises here specifically cited this case: "[w]e note that the Commission considered this question after the initial decision was issued. The Commission's decision, *Florida Gas [Transmission] Co.*, 19 FERC ¶ 61,293 (1982), supports the judge's conclusion." Opinion No. 160-A, 23 FERC (CCH) ¶ 61,030 (1983) at p. 61,074, App. 19a (footnote omitted).

> *was approved by the Commission in its 1976 section 4 review.* It is the composite rate that sets the lower limit. A change in the transportation costs cannot be held to be a violation of the "last clean rate" doctrine, a composite rate.

Florida Gas, 741 F.2d at 1311-12 (emphasis added). The Eleventh Circuit specifically held that the lower limit on the pipeline's refund liability in a 36 month review proceeding was the Base Tariff Rate previously approved in its last full Section 4 rate review, without mention of any intervening PGA tracking rate increases. Thus *Florida Gas* is both on point and in harmony with the Court of Appeals' memorandum opinion in the instant proceeding.

In short, there simply is no conflict between the decisions of the federal courts of appeals on this legal point. The Court of Appeals below was amply justified in affirming the Commission here.

Finally, assuming *arguendo* that the Court of Appeals' decision did conflict with the First Circuit's *Distrigas* opinion, it would not be a conflict that would trouble federal courts in the future. The Court of Appeals rendered its decision in an unreported memorandum opinion pursuant to D.C. Cir. Rule 13(c). Such a memorandum opinion cannot be cited as precedent even in other cases before the same Court of Appeals. *See* D.C. Cir. Rule 8(f). Thus, it is highly unlikely that the instant case will be "important for the industry as a whole." *Cf.* Arkla Petition at 17.

3. The Commission Did Not Award "Retroactive" Refunds Below The "Last Firm Rate."

While the above discussion amply shows why this Court should not allocate its limited resources to this case, Winfield will address briefly the merits of Arkla's claims.

First, contrary to Arkla's assertions (Arkla Petition at 16-17), 18 C.F.R. § 154.38(d)(4)(vi)(*c*) clearly defines the refund floor as the last Commission-approved rate without subsequent PGA or other tracking increases. Any possible doubt was resolved in the Commission's 1972 order denying rehearing of its adoption of its PGA regulations:

> Several requests for clarification and modification of Section 154.38(d)(4)(vi) were made. In order to clarify this subsection and to eliminate impracticable and unnecessary requirements, it will be revised accordingly. *It should be noted that the refund floor is the old Base Tariff Rate* [in the instant case 78.11¢ per Mcf] *and is not the last effective rate (i.e., the last Rate After Current Adjustment)* [in the instant case 168.73¢ per Mcf]. This refund floor minimizes the possibility that companies will be able to retain revenues in excess of their cost of service and permits the extent of potential liability for refunds to be known. *The potential refund liability is prospective from the date on which a cost study is filed, i.e., after termination of the 36-month period* [in the instant case November 1, 1980].

Purchased Gas Cost Adjustment Provisions In Natural Gas Pipeline Companies' FPC Gas Tariffs, Order No. 452-A, 47 FPC 1510, 1511 (1972) (emphasis added). In short, the Commission anticipated and rejected Arkla's argument when it first promulgated the PGA regulations in 1972.

As explained above, Arkla's claim that the Commission here violated its statutory powers under Section 4(e) of the NGA because it ordered refunds below the "last firm rate" in contravention of *FPC v. Sunray DX Oil Co.*, *supra*, is specious. The "last firm rate" for purposes of this case, as explained in Order No. 452-A above, was the old Base Tariff Rate without any cumulative PGA increases, and the Commission's opinion did not require

Arkla to make refunds below that rate. The Court of Appeals heard Arkla's arguments on this point, fully considered them, and then affirmed the Commission's opinions. App. 3a-4a.[8]

As this Court has noted, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the circuit courts of appeal.'" *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951), *quoting Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This case, while surely of importance to Arkla, falls short of meeting the above standard. Arkla has shown no "special and important reasons" meriting the grant of its petition as is required by Sup.Ct.R. 17.1. The Court should accordingly deny Arkla's Petition.

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[8] The Interstate Natural Gas Association of America ("INGAA") in its "Brief Amicus Curiae in Support of Petitioner" parrots these same arguments, failing even to cite to the applicable PGA regulations. This is not a "simple" Section 4 rate case, as INGAA apparently believes. INGAA Brief Amicus Curiae at 3. INGAA's obvious unfamiliarity with the facts below only confirms Winfield's belief that INGAA's participation as an *amicus curiae* would not enhance this Court's understanding of the issues. Rather, INGAA's presence is nothing more than a *post hoc* attempt to justify Arkla's argument that the Court of Appeals' unreported, non-precedential memorandum decision has national significance. It is for these reasons that Winfield has opposed INGAA's participation as an *amicus curiae*.

CONCLUSION

For the reasons set out above, Winfield respectfully requests this Court to deny Arkla's Petition in its entirety.

Respectfully submitted,

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